

1995

# Bonnie Harris, fka Bonnie Spivey v. Theresa Gutierrez Spivey, the Estate of Glendon G. Spivey, and Utah Retirement Systems : Brief of Appellee

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

**BONNIE HARRIS, fka BONNIE  
SPIVEY,**

**Plaintiff/Appellant,**

**vs.**

**THERESA GUTIERREZ SPIVEY, the  
ESTATE OF GLENDON G. SPIVEY,  
and UTAH RETIREMENT SYSTEMS,**

### Defendants/Appellees

**BRIEF       OF       APPELLEE**

**THERESA GUTIERREZ SPIVEY**

(Priority No. 15)

**Appellate Court #950494CA**

APPEAL OF AN ORDER OF DISMISSAL OF A PETITION TO MODIFY  
A DIVORCE DECREE FROM THE FOURTH JUDICIAL DISTRICT  
COURT OF UTAH COUNTY, STATE OF UTAH  
HONORABLE ANTHONY W. SCHOFIELD

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**FILED**

29 1996

## COURT DEALS

**BONNIE HARRIS, fka BONNIE  
SPIVEY,**

**vs.**

### Defendants/Appellees

[illegible]

APPEAL OF AN ORDER OF DISMISSAL OF A PETITION TO MODIFY  
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I

PARTIES TO THE APPEAL

The parties to this Appeal are the Plaintiff/Appellant, Bonnie Kay Harris, and the Defendant/Appellee, Theresa Gutierrez Spivey, aka Theresa Spivey.

Also named as defendants in the case at the trial court level were Utah Retirement Systems and the Estate of Glendon G. Spivey, deceased. Neither of those defendants submitted anything in the trial court proceedings or this appeal, except the Utah Retirement Systems submitted a Stipulation signed by all parties named in the trial court case and an order was signed by the Utah Court of Appeals dated 21 February, 1996, formally dismissing Utah Retirement Systems from the appeal.

## II

### TABLE OF CONTENTS

	<u>PAGE</u>
PARTIES TO THE APPEAL .....	1
TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	4
STATEMENT OF JURISDICTION.....	5
ISSUES FOR REVIEW ON APPEAL AND STANDARD OF REVIEW.....	6
Issues of Law.....	6
Issues of Fact.....	6
DETERMINATIVE CASES.....	7
STATEMENT OF THE CASE.....	7
A. Nature of the Case.....	7
B. Course of Proceedings Below.....	8
C. Disposition of Case at Trial Level.....	9
D. Statement of Facts.....	10
SUMMARY OF ARGUMENT.....	12
ARGUMENT.....	13
POINT I.....	13
The Trial Court Correctly Concluded That Appellant-Bonnie Harris' Petition To Modify Divorce Decree Was Barred By the Doctrine Of Laches.....	13
POINT II.....	15
The Trial Court Correctly Concluded As a Matter Of Law That Appellant-Harris' Petition Was Barred by the Doctrine of Res Judicata ( <u>Throckmorton v. Throckmorton</u> , 767 P.2d 121 (Utah App.1988)).....	15

POINT III.....	20
The Trial Court Correctly Concluded As A Matter of Law A Divorce Decree Cannot Be Modified After the Death of One of the Spouses.....	20
POINT IV.....	21
Appellant-Harris' Petition to Modify does not Allege Or Show Changed Circumstances.....	21
CONCLUSION.....	24
CROSS-APPEAL ON ATTORNEY FEES.....	25
Defendant Theresa G. Spivey Should Be Awarded Attorney Fees Under Rule 11, Sanctions and Utah Code 78-27-56.....	25
Conclusion on Cross-Appeal.....	26
CERTIFICATE OF MAILING.....	27
ADDENDUM	

III  
TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page No.</u>
<u>Alta Industries Ltd. v. Hurst</u> , 846 P.2d 1282, 1286 (Utah 1993) .....	6
<u>Carpenter v. Carpenter</u> , 722 P.2d 230, 150 Ariz. 52 (Ariz. 1986) .....	19
<u>Clark v. Chipman</u> , 212 Kan 259, 510 P. 2d 1257, 1266 (Kansas 1973) .....	15
<u>Cremins v. Simonds</u> , 636 P.2d 478 (Utah 1981).....	6
<u>Farrell v. Porter</u> , 830 P. 2d 299, 301 (Utah App. 1992) .....	20
<u>F.D.I.C. v. C. Goldy Limousine</u> , 810 F Supp 1124, 1127 (D. Col. 1993) .....	15
<u>Gale v. Gale</u> , 123 Utah 277, 258 P.2d 986 (Utah 1953)..	21
<u>Guffey v. LaChance</u> , 127 Ariz 140, 618 P. 2d 634 (Ariz Ct. App. 1980) .....	16
<u>Jacobsen Inv. Co. v. State Tax Commission</u> , 839 P.2d 789, 790 (Utah 1992) .....	6
<u>Jacobsen v. Jacobsen</u> , 703 P. 2d 303, 305 (Utah 1985)..	16
<u>Jensen v. Brown</u> , 639 P.2d 150 (Utah 1981).....	6
<u>Karren v. Karren</u> , 25 Utah 87, 69 P. 465 (Utah 1902)...	21
<u>Mostrong v. Jackson</u> , 866 P. 2d 573, 577 (Utah App. 1993) .....	6
<u>Nelson v. Davis</u> , 592 P. 2d 594, 597 (Utah 1979).....	20
<u>Osmus v. Osmus</u> , 114 Utah 216, 198 P.2d 233 (Utah 1948) .....	21
<u>Ostler v. Ostler</u> , 789 P.2d 7113 (Utah App. 1990).....	7, 17
<u>Papanikolas Bros. Enters v. Sugarhouse Shopping Center</u> , 535 P.2d 1256 (Utah 1975).....	13
<u>Searle Bros. v. Searle</u> . 588 P.2d 689 (Utah 1978).....	18

<u>Sorenson v. Kennecott - Utah Copper Corp.</u> , 873 P.2d 1141, 1147 (Utah App. 1994) .....	8
<u>Tanner v. Bacon</u> , 103 Utah 494,136 P.2d 957(Utah 1943) .	18
<u>Throckmorton v. Throckmorton</u> , 767 P.2d 121 (Utah App. 1988) .....	7, 15, 16, 17, 18, 19
<u>Trimble Real Estate v. Monte Vista Ranch, Inc</u> , 758 P.2d 451 .....	19
<u>United Park City Mines Co. v. Greater Park City Co.</u> , 870 P.2d 880, 885 (Utah 1993) .....	6
<u>Woodward v. Woodward</u> , 656 P.2d 431 (Utah 1982) .....	13, 19

#### OTHER AUTHORITIES

##### Statutes:

Utah Code Ann. 1953, as amended Section 49-1-103(15)...	22
Utah Code Ann. 1953, as amended Section 49-1-606(1)....	22
Utah Code Ann. 1953, as amended Section 78-2a-3(2)(i) ..	5
Utah Code Ann. 1953, as amended Section 78-27-56.....	25
U.S. National Retirement Equity Act of 1984.....	23
Utah Rules of Civil Procedure, Rule 11.....	25

##### Treatises and Other:

<u>24 Am Jur 2d</u> , Divorce and Separation, Section 492.....	14
<u>24 Am Jur 2d</u> , Divorce and Separation, Section 494.....	21
<u>Black's Law Dictionary</u> , 4th Ed. West Pub. Co. 1951 Page 1361 .....	18

#### IV JURISDICTION

Appellate jurisdiction is vested in the Utah Court of Appeals pursuant to the provisions of Section 78-2a-3(2)(i), Utah Code Ann. 1953, as amended.



ISSUES FOR REVIEW ON APPEAL AND STANDARD OF REVIEW

The issues presented by this appeal are as follows:

Issues of Law:

1. Did the trial court err in concluding that the necessary elements were present in this case so that Mrs. Harris' Petition was barred by the doctrine of laches?

2. Did the trial court err in concluding that the necessary elements were present in this case so that Mrs. Harris' Petition was barred by the doctrine of res judicata?

3. Did the trial court err in concluding that Mrs. Harris had not shown a substantial change in her circumstances since the Divorce Decree had been entered?

Standard of Review for Issues of Fact:

A trial court's findings of fact are reviewed under a clearly erroneous standard. Alta Industries Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993); Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1147 (Utah App. 1994); Mostrong v. Jackson, 866 P.2d 573, 577 (Utah App. 1993), cert. denied, -P.2d- (Utah 1994); Cremins v. Simonds, 636 P.2d 478 (Utah 1981); Jensen v. Brown, 639 P.2d 150 (Utah 1981).

Standard of Review for Issues of Law:

A trial court's conclusions of law in civil cases are reviewed for correctness which is also referred to as a "correction of error standard." United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Jacobsen Inv. Co. v. State Tax

Commission, 839 P.2d 789, 790 (Utah 1992).

VI

DETERMINATIVE CASES

Cases

Page No.

Ostler v. Ostler, 789 P.2d 713 (Utah App. 1990).....

Throckmorton v. Throckmorton, 767 P.2d 121  
(Utah App. 1988) .....

VII

STATEMENT OF THE CASE

(A)

NATURE OF THE CASE

Fifteen years after divorce and three months after the death of the husband (Glendon G. Spivey), the ex-wife (Appellant-Plaintiff, Bonnie Harris) filed a petition in this action (District Court Civil No. 9544400677) against the second wife, Appellee/Defendant, Theresa Spivey, to modify the property division in the decree in prior divorce action (District Court Civil No. 53,289) which was entered in 1980, to obtain retirement benefits of the deceased husband. The trial court granted the motion to dismiss filed by the deceased husband's second wife, Theresa Gutierrez Spivey. The ex-wife, Plaintiff-Bonnie Harris has appealed the trial court's ruling. Appellee/Defendant, Theresa Spivey, has cross-appealed the issue of the trial court denying her request for attorney fees.

(B)  
COURSE OF PROCEEDINGS BELOW

<u>Pleading Description</u>	<u>Filed Date</u>	<u>Filed By</u>	<u>Record No.</u>
1. Petition to Modify Divorce Decree	03/31/95	Plaintiff	R.7
2. Summons served 4/10/95 on Theresa G. Spivey.	04/24/95	Plaintiff	R.10
3. Motion to Dismiss Petition to Modify Divorce	05/01/95	Def/Spivey	R.21
4. Memorandum of Points and Author-ethos in Support of Theresa G. Spivey's Motion to Dismiss	05/01/95	Def/Spivey	R.38
5. Affidavit of Theresa G. Spivey in Support of Motion to Dismiss	05/01/95	Def/Spivey	R.46
6. Motion to have case assigned to Judge Park	05/01/95	Def/Spivey	R.18
7. Memorandum in Opposition to Motion to Have Case assigned to Judge Park	05/08/95	Plaintiff	R.53
8. Memorandum in Opposition to Theresa G. Spivey's Motion to Dismiss	05/14/95	Plaintiff	R.142
9. Reply to Memorandum in Opposition to have Case Assigned to Judge Park	05/15/95	Def/Spivey	R.58
10. Affidavit of Vernon L. Snow in Support of Motion to Assign case to Judge Park	0515/95	Def/Spivey	R.61

11.Reply to Plaintiff's Memorandum in Opposition to Dismiss Petition to Modify Divorce Decree	05/19/95 Def/Spivey	R.84
12.Minute Entry-matter certified to the Honorable Anthony W. Schofield	05/22/95 Court	R.84
13.Affidavit in Support of Petition to Modify Divorce Decree	05/24/95 Plaintiff	R/96
14.Notice to Submit for Decision- Motion to Dismiss Petition to Modify Divorce Decree	06/02/95 Def/Spivey	R.100
15.Transcript in Support of Petition to Modify Divorce Decree	06/07/95 Plaintiff	R.108
16.Documentation in Support of Petition to Modify Divorce Decree	06/16/95 Plaintiff	R.122
17.Objection to Unauthorized Filings	06/19/95 Def/Spivey	R.155
18.Ruling of Judge Schofield	06/20/95 Court	R.153
19.Order of Dismissal	07/20/95 Def/Spivey	R.160
20.Affidavit of Impecuniosity	08/16/95 Plaintiff	R.162
21.Notice of Appeal	08/17/95 Plaintiff	R.164
22.Notice of Cross Appeal	09/29/95 Def/Spivey	R.169

#### C. DISPOSITION OF CASE AT TRIAL LEVEL

The trial court dismissed the Petition to Modify Divorce Decree finding:

1. Laches bars litigation concerning the distribution of the retirement benefits as is more fully set forth in the court's

Ruling dated June 20, 1995. (R.160, 153.)

2. Res judicata bars litigation concerning the distribution of the retirement benefits as more fully set forth in the court's Ruling dated June 20, 1995. (R.160,153.)

3. A divorce decree cannot be modified in a separate action brought after the death of one of the spouses as is more fully set forth in the court's Ruling dated June 20, 1995, (R.160. 153.)

4. An award of attorney fees to Defendant/Theresa Spivey was denied. (R.160,153.) dated June 20, 1995. (R.160, 153.)

**D. STATEMENT OF FACTS**

1. Glendon G. Spivey (sometimes hereafter referred to as decedent) and Plaintiff-Bonnie Harris were married May 5, 1962. (R.6#8.)

2. Plaintiff-Harris and decedent were divorced May 15, 1980, in case no. 53,289, District Court of Utah County, State of Utah. The decree of divorce was granted after a trial in which both plaintiff and Glendon G. Spivey were represented by counsel. Plaintiff was represented by Brent D. Young, Attorney. (R.1,2,3,6.) Decedent was represented by attorney Thomas Taylor. (R.22.)

3. Financial Declarations were filed in the original divorce action by Plaintiff (R.27-24.), and Glendon G. Spivey. (R. 24-22.)

4. The divorce decree entered May 15, 1980, is silent as to any distribution of retirement funds or 401k or 457 plans. (R.3.)

5. Subsequent to the divorce Plaintiff-Bonnie Harris married Craig J. Harris on November 7, 1982. (R.45.) Glendon G. Spivey (now deceased) married Defendant- Theresa Gutierrez on November 27,

1982.(R.45.)

6. A son, Wade, was born to Glendon Spivey and Defendant-Theresa G. Spivey on May 7, 1985. (R.45.)

7. During the marriage between plaintiff and Glendon G. Spivey the plaintiff-Bonnie Harris worked for Signetics. Glendon G. Spivey worked for Provo City. (R.45 #2 and 3.)

8. According to the records of the Utah State Retirement Office, Glendon G. Spivey retired October 16, 1991, as an employee of the City of Provo. (R.39,40,41,44.)

9. In 1990 and 1991, Glendon G. Spivey changed the beneficiaries on his retirement and 401K retirement plan.(R.39-42.)

10. Glendon G. Spivey died on December 27, 1994, leaving as his surviving widow, Theresa Spivey (Appellee-Defendant), his wife of 12 years, and their son, Wade, then nine years of age who are the beneficiaries of his retirement benefit and his 401K plan.(R.44 #9,and 39,40,41,44.)

11. Defendant-Spivey and her son Wade Spivey are dependent on the monthly income received as beneficiaries of decedent-Glendon G. Spivey's retirement pension and 401K plan to meet current and future health, welfare, education and living expenses. and will be seriously adversely affected should the pension and 401K plan be reduced or eliminated. (R.44 #13.)

12. On December 29, 1994, Lisa Ann Spivey, daughter of the decedent from his marriage to Plaintiff-Harris signed a petition to have herself appointed Personal Representative in the Probate of Decedent's Estate. The petition was prepared by Charles A. Schultz,

the same attorney representing Plaintiff-Harris ((R.73.))

13. On December 30, 1994, the foregoing petition to have Lisa Spivey appointed Personal Representative of the Estate of Glendon G. Spivey, deceased, was filed with the court almost two hours before the decedent's funeral. (Utah County case No. 943400572. (R. 76,60,44#10.))

14. On January 11, 1995, Appellee/Defendant-Theresa Spivey filed a Counter-Petition in the probate proceeding. Sidney S. Gilbert was subsequently appointed Personal representative of the Estate of Glendon G. Spivey, deceased on stipulation. (R.44.)

15. On March 31, 1995, fifteen years after the divorce between Plaintiff and Glendon G. Spivey, and three months after Glendon's death, Plaintiff filed this separate action, case no. 954400677DA, seeking to modify the divorce decree dated May 15, 1980, in case no. 53,289. (R.7.)

16. Lisa Spivey, daughter of Plaintiff-Harris, is not only the original Petitioner in the probate case, but appears to be the secretary or assistant of Charles A. Schultz, the attorney for both Lisa Spivey and also Plaintiff-Harris. (R.60#4,75, and see various certificates of service of Appellant/Plaintiff-Harris.)

#### SUMMARY OF ARGUMENT

The Petition to Modify the Divorce Decree should be dismissed because:

1. Glendon Spivey, a necessary party to modify the divorce is dead.

2. Any modification of a divorce decree must be done in the

original proceeding and not in this, a separate proceeding.

3. The original divorce decree is res judicata as to the ownership of the retirement funds and 401k plan under the holding in Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988).

4. Laches bar this suit 15 years after the divorce decree.

5. Attorney fees should be imposed against Plaintiff.

#### ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANT-BONNIE HARRIS' PETITION TO MODIFY DIVORCE DECREE WAS BARRED BY THE DOCTRINE OF LACHES.

Judge Schofield succinctly sets forth the law of laches and its application in this case when he states at pages 3,4, and 5 of his ruling dated June 20, 1995, as follows: (R.151.)

"...Although few cases are resolved on the basis of laches, this is that unusual case where laches should apply.

For laches to bar a claim two elements must exist.

1. The lack of diligence on the part of plaintiff, and

2. An injury to defendant owing to such lack of diligence. Papanikolas Bros. Enters. v. Sugarhouse Shopping Center, 535 P.2d 1256 (Utah 1975)

Lack of diligence on the part of Bonnie seems obvious. She was divorced from Glendon in 1980. In Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the Supreme Court first ruled that retirement benefits are subject to division in a divorce action. That case was decided only two years after the divorce between Bonnie and Glendon and twelve years before his death. During that intervening twelve years Bonnie had ample time to bring any action she desired to determine any claim which she may have to Glendon's retirement benefits.

Glendon and Theresa married in 1982, over twelve years before his death. During that intervening twelve years Bonnie surely must have wondered what retirement benefits Theresa may have from Glendon and what, if any, benefits she was entitled to from Glendon's retirement.



Further, Glendon retired in October 1991, over three years before his death and three and one-half years before Bonnie brought this modification petition. By that time it must have been clear that Glendon was receiving some of his retirement benefits and that she was not. Again, Bonnie had ample time to bring an action to determine her claim to his retirement benefits.

These separate measures of the lack of diligence by Bonnie are persuasive. She did not act timely to assert her rights. Further, the prejudice to Theresa arising from Bonnie's delay also is clear.

The decision of whether Bonnie or Theresa is entitled to Glendon's retirement benefit is based, at least in part, upon Glendon's decision made in December 1990 to change the beneficiary of his retirement plan, naming Theresa. His intent, decision and actions all are relevant and yet Glendon is not available to testify. He is deceased. His absence is complete and unavoidable. Had this action been instituted while he was alive, during any of the fifteen years that passed after the entry of the decree and his death, during any of the twelve years that passed after the Woodward decision and his death, during any of the twelve years after Theresa and Glendon married and his death, or even during the three years after his retirement and his death, he could have participated in the litigation. Now his participation is forever lost.

Notwithstanding Bonnie's weak assertion to the contrary, for her to bring this action now, after Glendon had died places Theresa at a material and substantial disadvantage, a disadvantage that could have been avoided had Bonnie moved timely. That is the kind of prejudicial delay that a laches defense is all about. Bonnie has slept on her rights for at least three years, more likely twelve or fifteen years. She could have brought this action when a now unavailable, critical witness still was alive. (Footnote omitted.)

This is the appropriate case for a laches defense. Bonnie had ample time to raise the issue she now raises only after Glendon's death. Theresa is in a changed position because of her marriage to Glendon, because of his retirement and because of his subsequent death. To permit litigation at this late date would be to her significant prejudice. Laches bars this action."

24 Am Jur 2d states in Section 492, at page 521:

"The party seeking to set aside a divorce decree may be barred by laches where he has been guilty of a lack of diligence in learning the facts or in seeking relief and

innocent third persons have acquired rights by or through the remarriage of the other spouse in the meantime.

Plaintiff knew where Glendon worked. She had legal counsel in the divorce proceeding. A trial was held. All of the facts were available to her and her counsel. She knew Glendon had retired, yet she did nothing for 15 years. In the meantime, Glendon died and innocent persons- Theresa Spivey and Glendon and Theresa's son, Wade, will be adversely affected by Plaintiff's action. All the elements of laches exist, namely, (1) lack of diligence by the plaintiff against whom the defense is asserted and (2) prejudice to the party asserting the defense. F.D.I.C. vs. C. Goldy Limousine, 810 F Supp 1124, 1127 (D. Col 1993); Clark vs. Chipman, 212 Kan 259, 510 P.2d 1257, 1266 (Kansas 1973).

II. THE TRIAL COURT CORRECTLY CONCLUDED AS A MATTER OF LAW THAT Plaintiff-HARRIS' PETITION WAS BARRED BY THE DOCTRINE OF RES JUDICATA (THROCKMORTON V, THROCKMORTON, 767 P.2d 121 (UTAH APP.1988)).

The present case involves a very similar factual situation and the same legal issues as Throckmorton v. Throckmorton, supra, which was decided by this court in 1988.

Throckmorton v. Throckmorton, supra, involved a petition to modify a divorce decree filed by a former wife who had been married 21 years to the husband. Throckmorton's had eight children. Mr. Throckmorton was a policeman. Mrs. Throckmorton did not work outside the home. (Plaintiff in the instant case worked outside the home for Signetics.) Ten years after the Throckmorton divorce Mrs. Throckmorton filed a petition in the divorce case seeking increased

alimony and a share of Mr. Throckmorton's retirement benefits.

At page 122 of Throckmorton, supra, this Court stated:

The trial court further held Mrs. Throckmorton's claim to her former husband's retirement benefits was barred by the doctrine of res judicata.

This court in Throckmorton, supra, at page 123 discussed whether the trial court abused its discretion in denying Mrs. Throckmorton's claim to Mr. Throckmorton's retirement benefits stating:

The doctrine of res judicata applies in divorce actions. Jacobsen v. Jacobsen, 703 P.2d 303,305(Utah 1985). 'When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding.'... However, the application of res judicata is unique in divorce actions because of the equitable doctrine which allows courts to reopen alimony, support, or property distributions if the moving party can demonstrate a substantial change of circumstances since the matter was previously considered by the court....

We must determine whether the subsequent legal recognition of retirement benefits as marital property subject to distribution in a divorce case is a substantial change of circumstances, thereby precluding the application of res judicata. Or more specifically, whether Woodward should be given retroactive effect." (Emphasis added.)

The Court in Throckmorton, supra, then examined a similar factual case in Arizona, Guffey v. LaChance, 127 Ariz 140, 618 P. 2d 634 (Ariz Ct App. 1980). In Guffey, supra, a wife sought to modify a seven and-one-half-year-old divorce decree in order to share in her former husband's military retirement benefits. The Utah court went on to say in Throckmorton at page 124:

...Nonetheless, the court(Arizona) denied the wife's request to modify, stating. '(t)here is a compelling

policy interest favoring the finality of property settlement' and this policy would be 'greatly undermined if the court were to allow the potential for reexamination of every military divorce prior to the enactment of the rule'...

...We agree with the Arizona Court of Appeals, and find that legal recognition of a new category of property rights after a divorce decree has been entered is not itself sufficient to establish a substantial change of circumstances justifying a re-evaluation of a prior property division. Thus, we hold that the legal principles articulated in Woodward, should only be given prospective application. (Emphasis added.)

Later this Court revisited the question of retirement benefits in Ostler v. Ostler, 789 P.2d 713 (Utah App. 1990) following and referring to Throckmorton, supra, stating at pages 716-717:

Our opinion noted that res judicata 'is unique in divorce actions because of the equitable doctrine which allows courts to reopen alimony, support, or property distributions if the moving party can demonstrate a substantial change of circumstances since the matter was previously considered by the court.' ... We noted that pension benefits were first recognized as marital assets in Utah in Woodward v Woodward, 656 P.2d 431 (Utah 1982) ('Woodward I'). Throckmorton, 767 P.2d at 123. We then addressed the issue whether Woodward I should be given retroactive effect. Id. We ultimately determined that 'legal recognition of a new category of property rights after a divorce decree has been entered, is not itself sufficient to establish a substantial change of circumstances justifying a reevaluation of the prior property division." Id at 124)"

"In the instant case, appellant has articulated no change of circumstance justifying a reevaluation of the original property division. Appellant's claim of lack of knowledge of the retirement benefits does not constitute such a change. The only other possible change of circumstance is Woodward I's legal recognition of retirement benefits as marital assets. However, the decree of divorce was entered more than four years before the issuance of Woodward I and the modification order was entered a year before the issuance of Throckmorton. Inasmuch as Woodward I is to be given prospective application only, there is no appropriate basis on which to divide respondent's retirement account. Rather, we find the 'policy interest favoring the finality of

property settlement' to be compelling. (Emphasis added.)

The divorce decree in this case was rendered 8 years before Throckmorton, and 15 years before Plaintiff-Harris filed her Petition to Modify Decree. It was not a default or fraudulent divorce. Both parties were represented by counsel. The facts and the law as it then existed and the rights of each party were known and available to each party. A trial was held. The issues were litigated or could have been litigated. Res judicata bars the Plaintiff's petition to modify and the trial court so held..

Plaintiff-Harris misperceived and misapplies the broad concept of privity as it might apply to this case. A simple perusal of Black's Law Dictionary, Fourth Edition, West Publishing Co. 1951, page 1361 defines privity as follows:

PRIVITY. Mutual or successive relationship to the same rights of property.... Thus, the executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor...

Glendon gave-assigned all of his rights to the retirement and 401K plans to Theresa Spivey when he made her his beneficiary. (R.39-42.) Theresa is in privity with Glendon. She meets all of the requirements of Searle Bros. v. Searle, 588 P.2d 689 (Utah App. 1978) and Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (Utah 1943). The court in Tanner v. Bacon, supra, states beginning at page 959:

It is well settled that the doctrine of res adjudicata does not operate to affect strangers to a judgment; that it only affects the parties and their successors in interest, and those who are in privity with a party thereto....This court has defined the word "privity" as a mutual or successive relationship to the same right or property. As applied to judgments or decrees of courts, the word means one whose interest has been legally represented at the time.(Emphasis

added.)

This Court stated on the doctrine of res judicata in Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451 (Utah App. 1988) at page 453 as follows:

The doctrine of res judicata has two separate but related branches which can be asserted as affirmative defenses... The first branch, now known as claim preclusion but referred to previously as "pure" res judicata, bars the relitigation by the parties or their privies of a claim for relief previously resolved by a final judgment on the merits...."The same rule also prevents relitigation of claims that could and should have been litigated in the prior action but were not."...

The second branch of res judicata is collateral estoppel, or issues preclusion. Under this doctrine, the relitigation of factual issues that have one been litigated and decided is precluded even if the claims for relief in the two actions are different,... and even if only "the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication...." (Emphasis added.)

Clearly in the context of those pronouncements, Theresa Spivey is the successor to Glendon's interest. The divorce settled property interests of the parties. The court has spoken in Throckmorton that Woodward would only be applied prospectively in cases. Res judicata does apply in the present case.

Plaintiff-Harris cites Carpenter v. Carpenter, 722 P 2d 230, 150 Ariz. 52 (Ariz. 1986), in support of her claim that an ex-wife is entitled to pension benefits. That case is not applicable to the present case because Arizona is a community property state. The court in Carpenter,supra, only modified the decree in that case because of the property of the spouses was community property and the wife had a community property interest at the time of the divorce. Utah is not a community property state.

III. THE TRIAL COURT CORRECTLY CONCLUDED AS A MATTER OF LAW THAT A DIVORCE DECREE CANNOT BE MODIFIED AFTER THE DEATH OF ONE OF THE SPOUSES.

Judge Schofield's Ruling at R. 147 states:

While at first blush this point should be axiomatic, it merits fuller explanation.

A divorce decree settles the rights of the two divorcing parties. In this case Bonnie and Glendon were divorced in May 1980, some fifteen years before this modification proceeding was brought. At that time their respective interests in marital assets were determined. Now Bonnie asks that this Court modify that aged divorce decree. Yet, one of the parties is not present, nor can he be present as he died three months before the filing of this action. His property rights were fixed when he died. If Bonnie had any claim against him, it now would be a claim against his estate, not a claim to modify the divorce decree. Yet here she is asking this Court to ignore the fact of his death and determine the rights which she and Glendon have concerning a retirement benefit which accrued, if at all during a marriage which terminated fifteen years ago.

Farrell v. Porter, 830 P.2d 299,301 (Utah App. 1992), quoted with approval from the older case of Nelson v. Davis, 592 P.2d 594,597 (Utah 1979):

When the death of one or both parties to a divorce action occurs during the pendency of the action, the action itself abates and their status, including their property rights, reverts to what it had been before the action was filed.

If that language is accurate, then the death of Glendon abates any divorce modification proceeding. The rights of the parties thus are fixed at the status prior to the death. At that time Bonnie had no enunciated rights in Glendon's retirement. I see no reason she should have any now.

This case is different from Farrell as in Farrell the divorce was in process when Mr. Farrell died in a fishing boat accident while in this case Glendon's death occurred well before Bonnie brought her petition to modify. If Farrell and Nelson have meaning, it is that as between divorcing parties, property rights are fixed at the time of death and divorce cannot change or modify the effect of death in fixing property rights. If that is so in Farrell, it is more so in this case as Bonnie brought this action well after Glendon's death. Any

property rights which she may have had in common with Glendon were fixed and would need to be decided in the context of a probate of his estate, not by resort to a modification of the old divorce decree. (Footnote omitted.)

The general rule is that an application to vacate a decree of divorce does not lie after the death of a party. There is a conflict of authority upon questions of whether a divorce decree can be vacated after the death of a party where property rights are involved. Property interests, within the foregoing rule, are interests the surviving spouse has been wrongfully deprived by the divorce, 24 Am Jur 2d Divorce and Separation, Section 494.

The present Spivey case would not qualify, even if Utah courts followed jurisdictions which allowed property interests to be considered after death of a party because there is no fraud, none was alleged in the Petition to Modify Divorce Decree (R.8.), nor was this a default. Both parties were represented by counsel and a trial held. Further, if a modification of a divorce decree were done, it would have to be done in the same case rather than in a separate case. Karren v. Karren, 25 Utah 87, 69 P 465 (Utah 1902). With Glendon's death the court in the original divorce proceeding lost jurisdiction over him.

#### IV. APPELLANT-HARRIS' PETITION DID NOT ALLEGE CHANGED CIRCUMSTANCES

To modify a divorce decree the moving party must allege in the pleadings and prove changed conditions arising since the entry of the decree. Gale v. Gale, 123 Utah 277, 258 P.2d 986 (Utah 1953), which cites Osmus v. Osmus, 114 Utah 216, 198 P.2d 233 (Utah 1948).

Plaintiff- Harris' Petition to Modify is void of any allegation of substantial changed circumstances. (R. 8) It merely



states that the original Divorce court Findings of Fact, Conclusions of Law and Decree did not address the issue of retirement or 401K plans.

State and Federal Statutes also indicate the Petition to Modify is without merit and lacks substance.

**A. STATE STATUTES:**

Glendon Spivey was a retired employee of the City of Provo and a member of the Utah State Retirement System. Benefits of members of that retirement system are governed and controlled by the Utah Retirement Act. (Utah Statutes Section 49-1-103(15).)

Utah Code Section 49-1-606(1) states who are beneficiaries. It reads:

(1) If a member marries or remarries, all beneficiary designations dated prior to the most recent marriage and filed with the retirement office shall be canceled and the spouse shall be the beneficiary unless a different beneficiary designation is executed on or after the date of the marriage and filed with the retirement office, in which case the designation of beneficiary shall be binding in the payment of any benefits which may be due under this title. (Emphasis added.)

Theresa Spivey is the beneficiary of Glendon G. Spivey's retirement and 401(k) plan benefits in two ways.

First. Theresa is the beneficiary because Glendon G. Spivey designated her as the beneficiary by executing beneficiary forms on in 1990, and 1991. (R.41,42.)

SECOND. Even without the execution of the beneficiary designation forms, Theresa G. Spivey is the beneficiary because all prior executed designations were canceled under Utah Code 49-1-606(1), and as Glendon's spouse she is the beneficiary.

**B. FEDERAL STATUTES:**

Although Glendon's 401(k) plan is administered by the Utah State Retirement Office, Federal Law controls how such plans operate. The Utah State Retirement Office Beneficiary Change Form Glendon signed contains the following wording. (R.42.)

401(k) DEFERRED COMPENSATION PLAN: In compliance with the National Retirement Equity act of 1984, if you are married, your primary beneficiary MUST be your spouse unless you provide us with a NOTARIZED written consent from your spouse authorizing another beneficiary and waiving any claim to the benefits of this program. (R.42. A Clearer copy of R.42 is attached to this brief as Addendum 1.)

Bonnie-Harris' affidavit of having poor health 10 or 15 years after a divorce is without merit, and was not part of the pleading. She remarried two years after the divorce. Support is alimony and alimony ends after remarriage. Her present husband is the one Plaintiff needs to look to for support. A change in health 10 and 15 years after a divorce is not a change of circumstances to justify a modification of a property division in a divorce action where Plaintiff-Harris was represented by counsel and a trial held.

Two following hypothetical examples illustrate the impracticality of subsequent poor health 10 and 15 years later justifying modifying a prior divorce property settlement, especially where the other spouse is now dead. Chaos in the courts would result. Every healthy party in a divorce who at some later date in life suffered a decline in health would be back in court seeking to modify the court property division. Divorce cases would never end.

Hypothetical No. 1. The parties divorce. The husband-spouse in

the divorce dies. Fifty years later the other spouse develops poor health and files an action against the second wife to modify the divorce property division.

Hypothetical No. 2. The movie star Elizabeth Taylor has, according to some press reports, been married 8 times to 6 or 7 husbands. Other press reports state that Elizabeth has had poor health and been to medical centers for treatment. Could Elizabeth Taylor, now in her 60's expect the court to modify the property distribution in her first divorce which occurred 40 years ago while she was in her teens? What about the intervening husbands, and the style of living Elizabeth Taylor has followed in the intervening years? Are all of those divorces subject to being reopened and property distributions modified?

Glendon Spivey was not the guarantor of Plaintiff-Harris' health 8 and 15 years after the divorce.

The trial court weighed the matter of any change of circumstances. Judge Schofield states at page 6 of his Ruling:

...A property distribution was made fifteen years ago and no compelling circumstances are alleged which justify reopening that property distribution. (R.148)

#### CONCLUSION

A trial court's Ruling and Order dismissing the Petition to Modify Divorce Decree is well supported by the facts and the law. This court should affirm that holding.

**CROSS-APPEAL ON ATTORNEY FEES**

**Defendant Theresa G. Spivey should be awarded attorney fees under Rule 11, Sanctions and Utah Code 78-27-56.**

The court should be aware of some background matters which the record reflects to put this case in focus.

1. Glendon G. Spivey died December 27, 1994. (R. 3#13.)

2. On December 29, 1994, two days after his death, Lisa Spivey, a daughter of decedent and Appellant-Bonnie Harris signed a petition to have herself appointed personal representative of Glendon's estate. That petition was filed in the Fourth District Court, Utah County in probate case No. 943400572 on December 30, 1994, about two hours before her father- Glendon Spivey's funeral. (R. 76, 44#10.)

3. On January 11, 1995, Defendant-Theresa Spivey filed a counter-petition to have herself appointed personal representative. (R. 44#12.)

4. Sidney S. Gilbert, CPA, was subsequently named personal representative by stipulation. (R. 44#12.)

5, On March 31, 1995, 3 months after Glendon Spivey's death and 15 years after the divorce with Glendon, Plaintiff-Harris filed the present case to modify the divorce decree. (R. 6.) Who is the attorney for Appellant/Defendant-Bonnie Harris? It is Charles A. Schultz, who is also attorney for Lisa Spivey in the probate proceeding. Who is the person signing many of the certificates of delivery in the present case? It is the same Lisa Spivey who filed

the probate proceeding even before her father's funeral.


There appears to be a vendetta against Theresa Spivey, the surviving wife, attempting to get Glendon Spivey's assets which are needed by her and Wade, the young son of decedent and herself.


Items I through III above (Items 1 through VI of the Theresa Spivey's Memorandum to Dismiss) clearly show Plaintiff's action is without merit. It was brought without good faith, and is an obvious effort by Plaintiff's counsel, who is also counsel for the children from decedent's first marriage, to harass and increase attorney fees of Theresa Spivey. Defendant, Theresa. G. Spivey, should be awarded attorney fees for defending this action under Utah Code 78-27-56 and Rule 11 of the Rules of Civil Procedure.

CONCLUSION ON CROSS-APPEAL

That portion of the trial court Ruling and Order which denied Theresa Spivey her attorney fees should be reversed. She should be awarded her attorney fees.

Dated this 28th day of April, 1996.

  
M. DAYLE JEFFS  
Attorney for Defendant  
Theresa G. Spivey


  
VERNON L. SNOW  
Attorney for Defendant  
Theresa G. Spivey

**CERTIFICATE OF MAILING/DELIVERY**

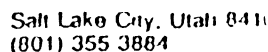
I hereby certify that the original and seven copies of the Brief of Appellee Theresa G. Spivey was delivered to the Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and two copies delivered to the below named parties by delivery of by placing the same in the United States mail, postage prepaid, this 29th day of April, 1996, addressed as follows:

CHARLES A. SCHULTZ  
Attorney at Law  
P.O. Box 526382  
Salt Lake City, Utah 84152-6382

SIDNEY S. GILBERT, C.P.A.  
190 West 800 North  
Provo, Utah 84601  
(Delivered)

  
VERNON L. SNOW

A D D E N D U M



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**INSTRUCTIONS:**

1. For name and address changes, complete only Section A unless you desire to designate your beneficiary.
2. Sections A and B must be completed when designating beneficiary.
3. This form **MUST BE** completely filled out and signed at the bottom in order to be processed.
4. Please type or print clearly in ink. DO NOT use pencil.

Soc Sec No 23-0-435	Name (Last, First, Middle) G Spruay, Glendon G HERR	<input checked="" type="checkbox"/> Not Rerated <input type="checkbox"/> Rerated
Birthdate 7-2-41	Street Address 2310 W PROVO UT	City Provo
Marital Status <input type="checkbox"/> Single <input type="checkbox"/> Divorced <input checked="" type="checkbox"/> Married <input type="checkbox"/> Widowed <input type="checkbox"/> Legally Separated	State UT	Zip 84601
Check all that apply (MOVED ONE HOME) <input type="checkbox"/> Name Change List previous name(s) <input checked="" type="checkbox"/> Address Change Previous Address 1110 W 3100 W, PROVO, UTAH <input checked="" type="checkbox"/> Primary Change (Complete Section B if you check this box. Otherwise, stop here and sign at the bottom)		

**INSTRUCTIONS:** There may be restrictions on whom you may designate as your beneficiary. Carefully read the following information on Beneficiary Designation before completing this section.

A change of beneficiary will take effect on the date you file a written request with the Retirement Office. If there is no beneficiary designation, or if your beneficiary does not survive you, the benefits are payable to the surviving next of kin of the deceased in the order of precedence established by the Utah Uniform Probate Code.

**UTAH STATE RETIREMENT SYSTEM:** In the event a member marries or remarries, the new spouse will automatically become the beneficiary unless a different beneficiary form is filed with the Retirement Office on or after the date of marriage. This provision applies only to the vested contributions paid upon the death of the member.

**Insurance Coverage:** If you are now, or have been married and resided, during that marriage, in a state having community property laws, Provident Life Insurance Company may be prevented from carrying out the directions contained in this request unless those who were given community property rights under such law consent to this change of beneficiary. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington are community property states. Refer to your insurance certificate for other provisions that apply to the insurance benefits of non-retired members.

**PUBLIC SAFETY, JUDGES' AND FIREFIGHTERS' RETIREMENT SYSTEMS:** A monthly benefit will be automatically paid to the spouse upon the member's death.

**457 DEFERRED COMPENSATION PLAN.** No restrictions apply.

**401(K) DEFERRED COMPENSATION PLAN:** In compliance with the National Retirement Equity Act of 1984, if you are married, your primary beneficiary **MUST** be your spouse unless you provide us with a **NOTARIZED** written consent from your spouse authorizing another beneficiary and waiving any claim to the benefits of this program.

Revoking any previous nominations of beneficiary, I hereby designate the following person(s) to receive all benefits payable upon my death, if I should die prior to the liquidation of my account, for the following plans: (Check all that apply. If you wish to designate different beneficiaries for each plan, photocopies of this form may be used.)

☒ All plans in which I am participating ☐ Retirement ☐ 457 Deferred Compensation Plan ☐ 401(k) Deferred Compensation Plan

**Primary Beneficiary(s)**

1	Name Theresa Spivey	Address (Street, City, State, Zip) 253 3110 W	Birth Date 4/23/56	Relationship Wife
2	Name Bade Spivey	Address (Street, City, State, Zip) 253 3110 W	Birth Date 5/7/85	Relationship Son
Secondary Beneficiary(s)				
1	Name Donnie Spivey	Address (Street, City, State, Zip) 214 W 2000 S	Birth Date 12/29/61	Relationship Son
2				

YOUR SIGNATURE IS REQUIRED TO PROCESS THIS FORM

Member Signature <i>Stanley H. Spivey</i>	Date May 10, 1990
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RETIREMENT OFFICE USE:

Fund: 5102 Date Processed: ENTERED 6/11/80

MECF-1 Nov 1999